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September 9, 2019

ATTORNEY GENERAL OPINION NO. 2019-7

Justin L. McFarland  
General Counsel  
Kansas Insurance Commissioner  
420 SW 9th Street  
Topeka, KS 66612-167

Re: Insurance—Utilization Review—Utilization Review Organization Act;  
Definitions; Certificate; Conditions.

Insurance—Regulation and Registration of Administrators—Regulation and  
Registration of Administrators; Certification as an Administrator; Home State  
TPA License; Nonresident License.

Insurance—Regulation and Registration of Administrators—Pharmacy  
Benefits Manager Registration Act; Definitions; Registration.

Public Health—Food, Drugs and Cosmetics—Exhibition of Title "Drugstore,"  
"Pharmacy" or "Apothecary;" Enforcement of Act; Penalty.

Public Health—Regulation of Pharmacists—Definitions; Registration or Permit  
Required; Repeated Violations of Act or Rules and Regulations May Be  
Enjoined.

Synopsis: The Kansas Insurance Department lacks authority to deny an application for a certificate to a utilization review organization, a registration to a pharmacy benefit manager, or a license to a third party administrator when the applicant is not licensed under the Kansas Pharmacy Act, yet uses or exhibits the words "drug store," "pharmacy," "apothecary," a combination of such titles, any title or description of like import, or any other term such as "Rx" designed to take the place of such title. Cited herein: K.S.A. 40-22a01; 40-22a03; 40-22a04; 40-22a06; K.S.A. 2019 Supp. 40-3801; 40-3810; 40-3812; 40-3813; 40-3817; 40-3821; 40-3822; 40-3823; K.S.A. 65-636; 65-646; 65-647; 65-655; 65-690;

65-691; 65-692; 65-1625; K.S.A. 2019 Supp. 65-1626; K.S.A. 65-1643; and 65-1647.

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Dear Mr. McFarland:

As General Counsel for the Kansas Insurance Department (KID), you ask for an opinion on whether the KID has the authority to deny an application for a certificate to a utilization review organization (URO), a registration to a pharmacy benefit manager (PBM), or a license to a third party administrator (TPA) operating in Kansas when the applicant is not licensed under the Kansas Pharmacy Act,<sup>1</sup> yet uses or exhibits the titles “drug store,” “pharmacy,” “apothecary,” a combination of such titles, any title or description of like import, or any other term such as “Rx” designed to take the place of such title. You also ask to what extent a URO, PMB, or TPA may use or exhibit these titles if it is not licensed under the Kansas Pharmacy Act. Your third question is whether the phrase “or other place” in K.S.A. 2019 Supp. 65-1626(xx) includes places other than physical locations, such as a website or written materials.

You state the KID has received applications from UROs, PBMs, and TPAs that use or exhibit the above-referenced titles. Your concern arises from two statutes, K.S.A. 65-636 and K.S.A. 65-1636, that limit the use of the above-referenced titles.

The Kansas Food, Drug and Cosmetic Act (KFDCA) includes K.S.A. 65-619 through K.S.A. 69-690, and K.S.A. 65-691 and K.S.A. 65-692, amendments thereto.<sup>2</sup> K.S.A. 65-636, which is a part of the KFDCA, states:

It shall be unlawful for any person, who is not legally licensed as a pharmacist by the state board of pharmacy, or any person, firm or corporation who does not have in continuous employ, at each place of business, a pharmacist licensed by the state board of pharmacy, to take, use or exhibit the title “drugstore,” “pharmacy” or “apothecary” or any combination of such titles, or any title or description of like import, or any other term designed to take the place of such title.

The symbol “Rx” is considered to be a term designed to the take the place of the titles “drugstore,” “pharmacy,” and “apothecary.”<sup>3</sup> As such, K.S.A. 65-636 prohibits the use of “Rx” by unauthorized entities.<sup>4</sup> The penalty for violating the KFDCA is a fine not exceeding

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<sup>1</sup> K.S.A. 65-1625 *et seq.*

<sup>2</sup> K.S.A. 65-655.

<sup>3</sup> Kansas Attorney General Opinion No. 97-8.

<sup>4</sup> *Id.*

\$200 or imprisonment not exceeding ninety days, or both.<sup>5</sup> The provisions of the KFDCA are enforced by the Kansas Attorney General and county attorneys.<sup>6</sup>

K.S.A. 2019 Supp. 65-1626(xx), which is a part of the Pharmacy Act, defines “pharmacy,” “drugstore” or “apothecary” as:

Premises, laboratory, area or other place: (1) Where drugs are offered for sale[,] where the profession of pharmacy is practiced and where prescriptions are compounded and dispensed; (2) that has displayed upon it or within it the words “Pharmacist,” “pharmaceutical chemist,” “pharmacy,” “Apothecary,” “Drug store,” “druggist,” “drugs,” “drug sundries” or any of these words or combinations of these words or words of similar import either in English or any sign containing any of these words; or (3) where the characteristic symbols of pharmacy or the characteristic prescription sign “Rx” may be exhibited. As used in this subsection, premises refers only to the portion of any building or structure leased, used or controlled by the licensee in the conduct of the business registered by the [Kansas Board of Pharmacy] at the address for which the registration was issued.”

K.S.A. 65-1643(a) requires a person to obtain from the Kansas Board of Pharmacy a registration to operate, maintain, open or establish a pharmacy. By continuing to use a deceptive name without such registration, a person is in violation of K.S.A. 65-1643(a) and the Board of Pharmacy may seek injunctive relief under K.S.A. 65-1647.<sup>7</sup>

The question of whether the KID may deny an application because a URO, PBM, or TPA uses or exhibits the titles referenced in K.S.A. 65-636 or K.S.A. 2019 Supp. 65-1626(xx) if the applicant is not licensed by the Kansas Pharmacy Board is dependent upon the statutes that grant authority to the KID. “Administrative agencies are creatures of statute and their power is dependent upon authorizing statutes, therefore any exercise of authority claimed by the agency must come from within the statutes. There is no general or common law power that can be exercised by an administrative agency.”<sup>8</sup>

The Utilization Review Organization Act<sup>9</sup> defines a URO as an “entity which conducts utilization review and determines certification of an admission, extension of stay or other health care service.”<sup>10</sup> To operate in Kansas, a URO must obtain a certificate from KID unless an exception is granted under K.S.A. 40-22a06.<sup>11</sup> However, the exemptions in that statute are not applicable to your question. To obtain a certificate, the URO must file an

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<sup>5</sup> K.S.A. 65-647.

<sup>6</sup> K.S.A. 65-646.

<sup>7</sup> *Kansas State Bd. of Pharmacy v. Wilson*, 8 Kan. App. 2d 359, 361 (1983) (the Kansas State Board of Pharmacy may enjoin a person from operating and advertising a health food store as “Nature’s Pharmacy”).

<sup>8</sup> *Pork Motel, Corp. v. Kansas Dept. of Health & Environment*, 234 Kan. 374, 378 (1983).

<sup>9</sup> K.S.A. 40-22a01 *et seq.*

<sup>10</sup> K.S.A. 40-22a03(c).

<sup>11</sup> K.S.A. 40-22a04(a).

application, submit other documents and information and pay a \$100 fee.<sup>12</sup> If those requirements are met, the KID is required to issue the certificate to the URO; there is no provision in the Act prohibiting a URO from using or exhibiting any title, words, or phrases in its name.<sup>13</sup> Thus, the KID cannot deny an application for a certificate to a URO because the applicant's name uses or exhibits the words "drug store," "pharmacy," "apothecary," a combination of such titles, any title or description of like import, or any other term such as "Rx" designed to take the place of such title even though the applicant is not licensed under the Kansas Pharmacy Act.

The Third Party Administrators Act<sup>14</sup> defines a TPA as "any person who directly or indirectly underwrites, collects charges or premiums from or who adjusts or settles claims on, residents of this state in connection with life, annuity or health insurance coverage offered or provided by a payor," subject to certain exclusions.<sup>15</sup> The KID can only refuse to issue a license to a resident TPA upon determining the applicant or an individual who is responsible for the conduct of the applicant's affairs "is not competent, trustworthy, financially responsible or of good personal and business reputation, or has had an insurance or administrator certificate of authority or license" from any jurisdiction denied or revoked for cause, or if any of the grounds in K.S.A. 2019 Supp. 40-3810 exist regarding the applicant.<sup>16</sup> None of those grounds mention the use of titles, words, or phrases in the applicant's name.

A nonresident TPA must file an application with the KID and hold a home state certificate of authority or license in a home state that has adopted a substantially similar law governing TPAs.<sup>17</sup> The KID can refuse to issue or to delay the issuance of a nonresident administrator license if it determines that, based upon events or information obtained after the home state's licensure of the TPA, the nonresident TPA "cannot satisfy the requirements of this act or that grounds exist for the home state's revocation or suspension of the administrator's home state certificate of authority or license."<sup>18</sup> K.S.A. 2019 Supp. 40-3813(h) does not prohibit a nonresident TPA from using or exhibiting any title, words, or phrases in its name.

Based upon the statutes governing a TPA, the KID is not authorized to deny an application for licensure as a resident or nonresident TPA because the applicant's name uses or exhibits the words "drug store," "pharmacy," "apothecary," a combination of such titles, any title or description of like import, or any other term such as "Rx" designed to take the place of such title even if the applicant is not licensed by the Kansas Board of Pharmacy.

The Pharmacy Benefits Manager Registration Act<sup>19</sup> defines a PBM as "a person, business or other entity that performs pharmacy benefits management. Pharmacy benefits manager includes any person or entity acting in a contractual or employment relationship for a

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<sup>12</sup> K.S.A. 40-22a04(b)(1)-(6).

<sup>13</sup> *Id.*

<sup>14</sup> K.S.A. 2019 Supp. 40-3821(a).

<sup>15</sup> K.S.A. 2019 Supp. 40-3801(a).

<sup>16</sup> K.S.A. 2019 Supp. 40-3812(e).

<sup>17</sup> K.S.A. 2019 Supp. 40-3813(a)-(b).

<sup>18</sup> K.S.A. 2019 Supp. 40-3813(h).

<sup>19</sup> K.S.A. 40-3821 *et seq.*

pharmacy benefits manager in the performance of pharmacy benefits management for a covered entity.”<sup>20</sup> A person who acts or operates as a PBM is required to obtain a registration from the KID.<sup>21</sup> To obtain a registration, the PBM must submit an application; provide the name, address, official position, and qualifications for each person who is responsible for the PBM’s conduct of affairs; and pay a fee.<sup>22</sup> If those requirements are met, there is no statutory language authorizing the KID to deny an application for registration as a PBM. Thus, the KID is not authorized to deny an application for licensure as a PBM because the applicant’s name uses or exhibits the words “drug store,” “pharmacy,” “apothecary,” a combination of such titles, any title or description of like import, or any other term such as “Rx” designed to take the place of such title even though the applicant is not licensed by the Kansas Board of Pharmacy.

You also asked two other questions. First, to what extent a URO, TPA, or PBM may use or exhibit the titles referenced in K.S.A. 65-636 and K.S.A. 2019 Supp. 65-1626(xx) if the URO, TPA, or PBM is not licensed under the Kansas Pharmacy Act. Second, whether the phrase “or other place” in K.S.A. 2019 Supp. 65-1626(xx) includes places other than physical locations, such as a website or written material. We decline to answer these questions as they are not within the jurisdiction of the KID and any violation of these statutes is dependent upon facts determined by the appropriate agency having jurisdiction.

In summary, we conclude that the KID lacks statutory authority to deny an application for a certificate to a URO, a license to a TPA, or a registration to a PBM when the applicant is not licensed under the Kansas Pharmacy Act, yet uses or exhibits the words “drug store,” “pharmacy,” “apothecary,” a combination of such titles, any title or description of like import, or any other term such as “Rx” designed to take the place of such title.

Sincerely,

/s/Derek Schmidt

Derek Schmidt  
Kansas Attorney General

/s/Janet L. Arndt

Janet L. Arndt  
Assistant Attorney General

DS:AA:JLA:sb

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<sup>20</sup> K.S.A. 2019 Supp. 40-3822(e).

<sup>21</sup> K.S.A. 2019 Supp. 40-3823(a).

<sup>22</sup> K.S.A. 2019 Supp. 40-3823(b)(1)–(3).